SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Civil Complex Center 751 W. Santa Ana Blvd Santa Ana, CA 92701	
SHORT TITLE: DeVone vs. Baker & Hostetler LLP	
CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2018-01029109-CU-PN-CXC**

I certify that I am not a party to this cause. I certify that the following document(s), Minute Order dated 08/01/19, have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from Orange County Superior Court email address on August 1, 2019, at 10:37:08 AM PDT. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 08/01/2019 TIME: 09:49:00 AM DEPT: CX101

JUDICIAL OFFICER PRESIDING: Glenda Sanders
CLERK: Antero Pagunsan
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: Carolyn J Reza

CASE NO: **30-2018-01029109-CU-PN-CXC** CASE INIT.DATE: 10/30/2018
CASE TITLE: **DeVone vs. Baker & Hostetler LLP**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Professional Negligence

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EVENT ID/DOCUMENT ID: 73098332

EVENT TYPE: Chambers Work - Submitted Matter

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 07/19/2019 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The motion to disqualify is **denied without prejudice** to it being renewed should further discovery lead to evidence supporting disqualification. Please see attached ruling.

The Status Conference set for 09/18/2019 is hereby continued to 11/06/2019 at 01:30 PM in this department.

Parties shall file an updated status report five (5) court days prior to the hearing.

The clerk is directed to give notice to all parties.

PenBen vs Baker Ruling

This matter arises out of an action filed by an investment brokerage firm, Pension & Benefit Insurance Services Inc. ("PenBen") against 6 former brokers and their new company. The defendants in the PenBen Litigation cross-complained against PenBen and Adam DeVone, the owner of PenBen, for defamation and other claims. (The complaint and cross-complaint are collectively referred to as (the "PenBen Litigation"). About two years into the case, Jones Day substituted in to represent both PenBen and DeVone (the "PenBen Parties"). The PenBen Litigation was tried in August and September 2015. The jury found against PenBen on all their claims and in favor of the individual defendants on a defamation claim against DeVone.

The PenBen Parties appealed. In March 2016, PenBen hired Michael Mortenson who was then with K&L Gates ("K&L") and substituted K&L in as their counsel. In October 2016, Mortenson moved to Baker & Hostetler ("Baker") and Baker was substituted in as counsel for the PenBen parties. In June of 2018, the Court of Appeal affirmed the judgment in all respects.

In October of 2018, following the appeal, the PenBen parties filed this malpractice suit against Baker, claiming that Baker committed malpractice because it advised them to wait until the appeal concluded to file a malpractice suit against Jones Day and the statute of limitations expired during the appeal.

The PenBen parties are represented in this action by Pierce Bainbridge (the "Pierce Firm"). Baker now seeks to disqualify the Pierce Firm on two grounds. First, Thomas Warren, a former Baker partner who worked on the appeal while at Baker, is currently a partner with the Pierce Firm (although not counsel on this case). Baker argues that this creates a conflict between Warren's ongoing fiduciary obligations to Baker and his current law firm's obligations to the PenBen Parties. Second, Baker argues that 3 Pierce lawyers (2 were formerly with Baker and 1 was formerly with K&L) will likely be witnesses in the malpractice trial.

The motion to disqualify was first heard on 5/10/19 and the parties were asked to submit supplemental briefing. That has now been done and the Court issues the following ruling.

Conflict allegedly created by Warren's partnership at Baker.

Warren was formerly a partner with Baker. He subsequently joined the Pierce Firm who represent the PenBen Parties in this malpractice action against Baker. When he joined the Pierce Firm, an ethical wall was imposed prohibiting Warren from participating in this matter or communicating with those who are working on it. Beck Dec., ¶¶ 1-8; Bainbridge Dec., ¶¶ 2-4; Bolton Dec., ¶¶ 2-4; Fridland Dec., ¶¶ 2-

4; Kuylman Dec., ¶¶ 2-4; Ludemann Dec., ¶¶ 2-4; Pierce Dec., ¶¶ 4-6; Sorkowitz Dec., ¶¶ 4-6; and Wolinsky Dec., ¶¶ 2-4.

As a former Baker partner, Warren continues to have certain statutorily defined duties of loyalty to Baker under Cal. Corp. Code §§ 16603 and 16404(b)(1) and (2). Baker argues that a conflict of interest is created by those continuing duties and the Pierce Firm's duties to the PenBen Parties in this malpractice suit against Baker. The duties created by §§ 16603 and 16404(b)(1) and (2) are limited to a duty to hold certain property, profit or benefits for the partnership and "[t]o refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership." Cal. Corp. Code § 16404(b)(1) and (2).

Nothing in Warren's conduct violates any aspect of (b)(1) which relates to holding property, profit or benefit derived through the use of partnership property or information. The question then is whether Warren is "dealing with [Baker] in the conduct . . .of . . . [Baker's] business . . . on behalf of a party having an interest adverse to the partnership."

The PenBen Parties are suing Baker for malpractice which is an "interest adverse" to Baker. But Warren is not "dealing with" Baker in the conduct of its partnership business on behalf of the PenBen Parties. He has played no part in the current malpractice suit. He has not provided any information regarding Baker's work on the PenBen Litigation to anyone working at the Pierce Firm. Warren's continuing duty of loyalty to Baker is owed by Warren only, not by his current law firm. The Corporations Code does not extend the duty of loyalty expressly or impliedly to Warren's current law firm. As a result, his current firm's representation of PenBen does not violate Warren's duty to Baker and so there is no conflict requiring disqualification. Had the legislature intended this duty of loyalty to extend to a former partner's new partnership, company or other entity, it could have so provided. It did not.

At the hearing, Baker argued that a conflict created by a duty of loyalty *and imputed to the law firm*, cannot be cured by an ethical wall because the purpose of such a wall is to prevent the flow of information between the "prohibited" attorney and the rest of his law firm. Baker argues the ethical wall serves no purpose here because the wall cannot erase the existence of a duty of loyalty. Because the Court has determined that Warren's duty of loyalty cannot be imputed to the rest of the Pierce Firm, the efficacy of an ethical wall is irrelevant. None need be erected where there is no imputation. For the reasons set forth below, however, the pragmatic erection of an ethical wall is appropriate

The Case Law

Lacking statutory support for its "imputed conflict" argument, Baker argues that case law supports the proposition that Warren's duty of loyalty creates a conflict for the Pierce Firm --- or, in the parlance of professional conduct rules and disqualification law, Baker argues that Warren's duty of loyalty is imputed to all attorneys at the Pierce Firm and so the Pierce Firm is disqualified from representing the PenBen Parties. In support of this argument, Baker relies on three cases:

1. *William H. Raley Co., Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1049;
2. *Allen v. Academic Games Leagues of America, Inc.* (C.D. Cal. 1993) 831 F.Supp.785; and
3. *In re Mortgage & realty Trust* (Bankr. C.D. Cal. 1996) 195 B.R. 740.

The cases (two of which are federal authority and do not bind this Court) do not support disqualification of the Pierce Firm.

In *Raley*, the court determined there was a conflict where a law firm represented a *plaintiff* in a breach of lease claim and one of the firm's partners was concurrently a director of a bank that managed a trust of the *defendant's* property. The court determined that a conflict arose because the partner's fiduciary duties to the trust beneficiaries (which would require him to focus on the weaknesses of the case) were directly in conflict with his duties as a partner of the firm (which would be advocating the strengths of the case). Thus, the firm was placed "on both sides of [the] lawsuit." The conflict was further exacerbated by the partner's "ongoing accessibility to confidential information" which could be pertinent to the lawsuit.

Although *Raley* generally held that that a conflict can arise from an attorney's involvement with a party or entity outside of the attorney-client relationship, its holding is not applicable here as it is distinguishable on its facts. In this case, there is neither simultaneous representation of competing interests (Warren is not currently in the Baker camp unlike the partner/bank director in *Raley*) nor does Warren have "ongoing accessibility to confidential information."

The Allen case also involved simultaneous representation of competing interests. In *Allen*, Steven Wright ("Wright") acted as an advisor to a company known as "NAGP". In his role as an advisor, Wright notified NAGP of potential trademark and copyright violations by a company called Academic Games Leagues of America, Inc. Ultimately, NAGP sued Academic Games for trademark and copyright infringement. Academic Games was represented in the litigation by Seyfarth Shaw. Wright was an attorney at Seyfarth Shaw. The court determined that Seyfarth

Shaw should be disqualified based on Wright's *involvement on both sides* of the issue, stating:

> In the instant case, Wright appears to be directly involved with the litigation on behalf of the defendants. Furthermore, he remained affiliated with the plaintiff as an advisor for more than a year after he learned of the threatened litigation. In addition, he took no steps to isolate himself from the litigation while he remained with the plaintiff corporation. Finally, Wright did not resign until after the case was filed and the final defendant was served. Therefore, Wright's connection with plaintiff's business while a licensed attorney and his failure to avoid any possible conflict of interest provide a sufficient basis for disqualification under *William H. Raley Co.*

Allen, 831 F.Supp. at 788-789

In re Mortgage & Realty Trust did not involve simultaneous representation but still involved opposing loyalties *to a client.* In that case, an attorney (Bucher) served on the Trust's board of trustees. While Bucher was on the board, the board considered a contract between the Trust and a company known as Zim. Later, the Trust sued Zim over the contract. Zim was represented in the litigation by Bucher's firm, Bryan Cave. The court found that disqualification was necessary to protect the confidential information likely received by Bucher in his role as a trustee:

> The Court finds it likely that [Bucher] received confidential information relating to the transaction with Zim at the board meeting where the transaction was approved. He may have received confidential information relating to the transaction or to [the Trust] generally that is relevant to this litigation outside of the board meeting as well. Thus, the Court must presume that he received such confidential information, and holds that this presumption is irrebutable. Bucher is disqualified from representing Zim in this litigation.

The disqualification was, further, based on the firm's failure to erect an ethical wall.[1]

These 3 cases all involve situations where an attorney has represented clients in some capacity who are directly adverse to one another in the same

[1] *In re Mortgage* was decided in 1995, when ethical walls typically allowed only for "former government attorneys entering private practice" but recognized that the practice was beginning to be extended to situations where an attorney moves from one firm to another and, so addressed, the firm's failure to erect such a wall.

litigation/transaction. As the cases are all distinguishable on their facts, they do not support the proposition that a conflict requiring disqualification of the Pierce Firm exists here.

Imputation under Rule 1.10.[2]

Baker also argues that Warren's conflict is imputed to the entire firm under Rule 1.10. Again, as set forth above, there is no conflict. Even if there were, there is no imputation under 1.10 and, if there were, it would be addressed by the Pierce firm's creation of an ethical wall.

Rule 1.10 provides that there is no imputation to the firm where "the prohibition [against the individual lawyer's representation of the client] is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client . . ." Rule 1.10(a)(1). Here, while the alleged conflict *is* based on a personal interest of the prohibited lawyer, *i.e.* Warren's prior partnership in Baker, that interest "does not present a significant risk of materially limiting the representation of **the client** (PenBen) by the remaining lawyers in the firm." (Emphasis added.) Any danger is to Baker, not the client.

Rule 1.10 also allows any imputation to be resolved by an ethical wall where the prohibition arises out of an attorney's association with a prior firm and the attorney did not "substantially participate in the same or a substantially related matter." Rule 1.10(a)(2). In determining "substantial participation," the court must examine "the lawyer's level of responsibility in the prior matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the *former client,* and the extent to which the lawyer was exposed to confidential information of the *former client* likely to be material in the current matter." Comment to Rule 1.10. (Emphasis added.) First, while PenBen is a "former client" of Baker and Warren, PenBen is not the "former client" that Rule 1.10 was logically intended to protect. PenBen is a former client who has also become the Pierce Firm's current client that, far from wanting to prevent the Pierce Firm from representing it, wants to retain the Pierce Firm as its counsel. Baker is taking a rule intended to protect a former client and attempting to use it, not to protect that former client, but rather to protect that former client's former law firm.

But, even if Rule 1.10 applies in this situation, the evidence provided by Baker regarding Warren's involvement establishes that he did not substantially participate in the PenBen appeal. His participation in the appeal was short and sporadic; and he neither advised nor had contact with PenBen, the client that Rule 1.10 is intended to protect. He billed 23.2 hours on the appeal, most of it spent

[2] As a side note, the Court understands that the California Rules of Professional Conduct are guidelines on the issue of disqualification, not statutes binding this Court.

editing the opening and reply briefs which had been prepared by other Baker attorneys. Because Warren did not "substantially participate" in the underlying action, an ethical wall is appropriate under Rule 1.10 and the ethical wall imposed by the Pierce Firm would be sufficient if there had been a conflict.

Advocate and Witness.

As an alternative ground, Baker also argues that Pierce Firm should be disqualified under Rule 3.7 because they believe three Pierce attorneys, Warren, Jonathon Sorkowitz and John Pierce, will be witnesses in the malpractice suit. Rule 3.7 prohibits a lawyer from being both an advocate and witness in a trial unless;
(1) the testimony relates to an uncontested matter,
(2) the testimony relates to the nature and value of legal services rendered in the case, or
(3) the client gives written consent.

Here, the Pierce Firm states that it has the client's written consent. But written consent may not be sufficient as the court retains discretion to disqualify an attorney who will be both witness and advocate "to protect the trier of fact from being misled or the opposing party from being prejudiced." Rule 3.7, Comment 3.

In determining whether the trier of fact will be misled or the opposing party prejudiced, the court must consider, among other things, the "strong interest parties have in representation by counsel of their choice" and "whether counsel's testimony is, in fact, genuinely needed." *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 580-581. In deciding whether the testimony is genuinely needed, the court should "consider the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established. *Smith, Smith & Kring*, 60 Cal.App.5th at 581 (internal quotation marks and citations omitted).

Because the Pierce Firm has informed the Court that it has written consent from the client, disqualification is appropriate only if the criteria described above are met.

According to the complaint, the only alleged malpractice is that Baker advised the PenBen parties that they should wait to file the malpractice claim until after the appeal. Complaint, ¶¶38-39. Baker argues Warren will be a witness because of his work on the appellate briefs. Based on the evidence presented by Baker (the billing records and all of Warren's emails concerning the PenBen Litigation), he had no contact with the client and played no role in the advice to delay the malpractice suit against Jones Day.

His involvement was limited to work on the opening and reply briefs in the appellate matter and these have nothing to do with the allegedly erroneous advice. Warren is, at best, a tangential witness and one who will not be an advocate in this matter. His involvement is not sufficient to support disqualification of the firm.

Baker argues that John Pierce will be a witness because he advised the PenBen parties on the potential malpractice claim against Jones Day while he was employed by K&L. In support of this argument, Baker provided an interrogatory response which did not mention John Pierce and an email from another K&L attorney to the PenBen parties which suggests that John Pierce might be "looped in" on a conversation regarding the malpractice claim. Baker does not provide any evidence to suggest that John Pierce was ever looped in and John Pierce has submitted a declaration saying he doesn't remember being consulted. Pierce Dec., ¶¶ 2-3. Further, the "looped in" email was from an attorney at K&L and, at the time, Pierce was at K&L. K&L is not being sued for malpractice, so advice given by K&L is irrelevant to the claims raised in this litigation. Based on the evidence currently before the Court, John Pierce's potential involvement is not sufficient to disqualify either John Pierce or his firm.

Baker argues that Sorkowitz will be a witness based on his participation in a July 12, 2018 telephone conversation between Michael Mortenson (PenBen's "principal attorney" at both K&L and Baker, Complaint, ¶¶ 32-33). According to an interrogatory response from DeVone, the three discussed the potential malpractice claim at that time and "Mr. Mortenson was advised that Mr. Sorkowitz's research indicated a claim against JONES DAY could be time-barred, to which Mr. Mortenson responded in substance that he did not know whether the statute of limitations had expired and that Mr. Sorkowitz's analysis could well be correct." Garner Dec., Exhibit 3, response to Interrogatory No. 17. Again, the alleged malpractice is the advice to delay filing a malpractice claim while the appeal was pending. As stated in the interrogatory response, Sorkowitz was not involved in giving that advice; his involvement came after the statute of limitations had expired and so he is not a necessary witness to the claim. He is the after-the-fact bearer of potentially bad news concerning the advice allegedly given without his involvement.

Baker also argues that Sorkowitz is bound by the New York rules of professional conduct because he is licensed to practice in New York. But he is appearing before this Court, pro hac vice and is bound by the California rules while in a California court. CRC, Rule 9.40(f). Further, the New York rule applies only where the attorney is likely to be a necessary witness on a significant issue of fact. *S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.* (1987) 69 N.Y.3d 437, 445-446; *Lefkowitz v. Mr. Man, Ltd.* (1st Dept. 1985) 111 A.D.3d 119, 121. That is not the situation here.

Based on the evidence currently before the Court, Sorkowitz's involvement is not sufficient to disqualify either Sorkowitz or the Pierce Firm.

The motion to disqualify is **denied without prejudice** to it being renewed should further discovery lead to evidence supporting disqualification.

Date Judge Signed: August 01, 2019

Honorable Glenda Sanders
JUDGE OF THE SUPERIOR COURT